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Honorable Judge Samuel J. Steiner
DATE: November 12th, 2010
TIME: 9:30 a.m.
Chapter 11
LOCATION: Seattle
RESPONSE DUE: Friday, Nov. 5, 2010

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: Adam R. Grossman, Debtor.	CHAPTER 11 BANKRUPTCY CASE NO. 10-19817-SJS DEBTOR-IN-POSSESSION'S OBJECTION TO BORODIN'S MOTION FOR ORDER FOR DISGORGEMENT OF FEES

COMES NOW THE DEBTOR-IN-POSSESSION ("Debtor"), by and through his undersigned attorney, and in response to the Motion for Order for Disgorgement of Fees ("Motion") filed by Jill Borodin ("Borodin"), states the following:

I. Debtor had complied with § 327 and FRBP 2014

Borodin states in her Motion that "On or about the time of Ms. Tsai's engagement, the Debtor paid Ms. Tsai a retainer of $7,500 with funds borrowed from friends and family members post-petition." (See Borodin's Motion, pages 1, line 44 through page 2, lines 1-3). This is not correct.

As stated in the Declaration of Emily Tsai, docket entry 43, page 3, line 2-3 (in Support of the Debtor-in-Possession's Application For Authority to Employ Family Law Attorney as Debtor's Special Counsel Nunc Pro Tunc), the payment of $7,500 from Peter Hendricksen was made directly to Ms. Tsai by Mr. Hendricksen and was not made by the Debtor-in-Possession. Further, as stated by the Debtor-in-Possession in his Application For Authority to Employ Family Law Attorney as Debtor's Special Counsel Nunc Pro Tunc, docket entry 42, page 3, line 2, that payment was made to Ms. Thai with no strings attached. Finally, Mr. Hendricksen is not a creditor of the Estate.

Borodin further states in her motion that "Neither the Debtor nor Ms. Tsai has filed an application for approval of Ms. Tsai's employment as special counsel as required under 11 U.S.C. §§ 327(e) and 2014." (See Borodin's Motion, page 2, lines 3-8). While that was correct at the time that Borodin filed her Motion, this is no longer correct. On November 4, 2010, Debtor filed an Application For Authority to Employ Family Law Attorney as Debtor's Special Counsel Nunc Pro Tunc on November 4, 2010 (see docket entry 42), along with the above mentioned Declaration of Emily Tsai, docket entry 43, and Debtor's Memorandum of Points and Authorities in Support of Debtor's Application to Employ, docket entry 48. Accordingly, the Employment of Special Counsel requirements of the code (§ 327) and the procedures for employment rules under Federal Rule of Bankruptcy Procedure 2014 have been complied with by Debtor.

Borodin then accuses Debtor of (in the current tense) continually diverting funds from the bankruptcy estate to Ms. Tsai. (See Borodin's Motion, page 4, lines 3-8). Debtor has not diverted, paid, or used any funds of the estate to pay the legal fees of Ms. Tsai other than the

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$5,000 paid to Ms. Tsai by Debtor on September 25, 2010, (See Declaration of Emily Tsai, docket entry 43, page 3, lines 14-17), which, having then been placed in Ms. Tsai's IOLTA account, was returned to Debtor on October 22, 1010. (See Declaration of Emily Tsai, docket entry 43, page 3, lines 18-22). In other words, Ms. Tsai has never benefited from any funds from Debtor's estate.

II. The Cases Cited by Borodin are Distinguishable

The cases cited to by Borodin in support of her Motion are factually distinguishable from this case.

In In re Lewis, 113 F.3d 1040, 1044-1045, 37 Collier Bankr.Cas.2d 1596, 30 Bankr.Ct.Dec. 1041, Bankr. L. Rep. P 77,372, 97 Cal. Daily Op. Serv. 3533, 97 Daily Journal D.A.R. 6045, (C.A.9 (Cal.),1997), the law firm representing that Debtor "presented false information in its application for employment under § 327 and Rule 2014(a)." Id. at 1045. No false information has been presented to this court in Debtor's Application to Employ Ms. Tsai as Special Counsel.

In In re Park-Helena Corp., 63 F.3d 877, 879, 64 USLW 2147, 34 Collier Bankr.Cas.2d 429, 27 Bankr.Ct.Dec. 893, Bankr. L. Rep. P 76,602, 95 Cal. Daily Op. Serv. 6558, 95 Daily Journal D.A.R. 11,215, (C.A.9 (Cal.),1995, the court found that Neben & Starrett's failure to disclose was willful, and that they violated Federal Rules of Bankruptcy Procedure 2014 and 2016 by failing to disclose (1) the true source of the retainer, and (2) the firm's connections to Meyer. In this instance, the source's of the retainers and all of the relationships between the parties have been made clear to this Court in Debtor's Application to Employ Ms. Tsai as Special Counsel and the supporting Declaration of Emily Tsai.

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In In re Begun, 162 B.R. 168, 172, 30 Collier Bankr.Cas.2d 833, Bankr. L. Rep. P 75, 674 (Bkrtcy.N.D.Ill.,1993), Lasman (the broker in that case) filed an amended affidavit on October 7, 1993, (five and one half months after the initial fee affidavit) making full and complete disclosure of and confirming the Broker's various previously undisclosed connections with the Trustee's Law Firm. In essence, the broker in Begun presented false information to the court in its original fee application affidavits. That is not true in the case before this court.

III. BAPCPA Section 1115(a) Requires Portions of a Chapter 11 Debtor's Divorce Fees to be Paid by Third Parties

Finally, payments of a chapter 11 Debtor's divorce attorney's fees by a third party are, under BAPCPA Section 1115(a) the only way that a chapter 11 debtor can proceed with a divorce action.

In the case of In re Goldstein, 383 B.R. 496, Bankr. L. Rep. P 80, 987 (Bkrtcy.C.D.Cal., 2007), the Court held that:

> "In In re Colin, 27 B.R. 87, 89 (Bankr.S.D.N.Y. 1983), a chapter 11 debtor was permitted to retain special counsel for marital dissolution so long as the services concerned the dissolution of marriage as well as the disposition of estate property. Id. However, only professional services relating to the disposition of estate property were reimbursable from the bankruptcy estate. In contrast, services relating to the marital dissolution could not be reimbursed from the estate. Id. The Colin court required special divorce counsel to prepare professional fee applications in detail so that the court could distinguish between legal services relating to the disposition of estate property and representation concerning the marriage dissolution. Id.
>
> BAPCPA made a fundamental change in how post-petition divorce actions (and many other expenses in an individual's chapter 11 case) can be funded. Section 1115(a), which BAPCPA added to the bankruptcy code, provides in relevant part:

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> [i]n a case in which the debtor is an individual, property of the estate, in addition to the property specified in section 541-
>
> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
>
> > FN4 Section 541 broadly defines property of the estate to include "all legal and equitable interests" of the debtor in property at the date of the filing of the bankruptcy petition (with certain exceptions not relevant here).
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.
>
> Thus § 1115(a) gives rise to a new issue that individual chapter 11 debtors have never faced before, because it deprives most individual debtors of any non-estate assets that can be used for any purpose. Essentially all property that an individual debtor obtains while the chapter 11 case is pending is now property of the bankruptcy estate (unless the debtor has the good fortune of having non-estate property, which is unlikely in most cases). Now, individual chapter 11 debtors are no longer permitted to use their post-petition income to pay divorce counsel unless such an expense is authorized for property of the bankruptcy estate."

Clearly, however, by enacting the BAPCPA, Congress did not intend to prohibit chapter 11 debtors from getting divorced. "Preventing a debtor from retaining counsel to get a divorce is not one of the purposes of the bankruptcy code." In re Goldstein, 383 B.R. 496, Bankr. L. Rep. P 80, 987 (Bkrtcy.C.D.Cal., 2007).

Therefore, under the BAPCPA, the only remaining way under the current version of Section 1115(a) is for a third party (or parties) to pay for those portions of a chapter 11 Debtor's divorce proceeding that are non-estate related.

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IV. Borodin has no standing to bring this Motion before the Court

Borodin states in her Motion that she is "a creditor herein." (See Borodin's Motion, page 1, line 23). This is not correct.

Borodin has filed no Claims against the Debtor's estate as of the date of this Objection. (See Claims Register for this case as of November 5, 2010, Attached as Exhibit A). Debtor has not listed Borodin as a creditor in Debtor's schedules. Borodin may, perhaps, *become* a creditor at some future date due to a ruling of the State Court in Debtor & Borodin's divorce proceeding, but Borodin's claim to be a creditor now, at the time of the filing if her Motion, is premature and erroneaous. Musso v. Ostashko, 468 F.3d 99, 108, 56 Collier Bankr.Cas.2d 1785, Bankr. L. Rep. P 80,771, (C.A.2 (N.Y.), 2006). Accordingly, as Borodin has no standing to bring this Motion, the Motion should be denied.

WHEREFORE, the Debtor respectfully requests that this Court enter an Order denying the Motion in its entirety with prejudice and award such further and different relief as this Court deems proper and just.

Respectfully submitted this 5th day of November, 2010.

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By: /s/ Matthew D. O'Conner
Matthew D. O'Conner, WSBA #27061
Attorney for Debtor-in-Possession

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Western District of Washington
Claims Register

10-19817-SJS Adam R Grossman

Judge: Samuel J. Steiner **Chapter:** 11
Office: Seattle **Last Date to file claims:**
Trustee: **Last Date to file (Govt):**

Creditor: (952683338) Discover Bank Dfs Services LLC PO Box 3025 New Albany, OH 43054-3025	**Claim No: 1** *Original Filed* *Date*: 08/25/2010 *Original Entered* *Date*: 08/25/2010	*Status:* *Filed by:* CR *Entered by:* Discover Financial Services, *Modified:*

Unsecured claimed: $6416.20
Total claimed: $6416.20

History:
Details 1-1 08/25/2010 Claim #1 filed by Discover Bank, total amount claimed: $6416.2 (Discover Financial Services)

Description:

Remarks:

Creditor: (952738298) Wells Fargo Bank, N.A. Home Equity Group X2303-01A 1 Home Campus Des Moines, IA 50328-0001	**Claim No: 2** *Original Filed* *Date*: 09/21/2010 *Original Entered* *Date*: 09/21/2010	*Status:* *Filed by:* CR *Entered by:* Wells Fargo Bank NA, *Modified:*

Secured claimed: $87255.10
Total claimed: $87255.10

History:
Details 2-1 09/21/2010 Claim #2 filed by Wells Fargo Bank, N.A., total amount claimed: $87255.1 (Wells Fargo Bank NA)

Description: (2-1) Real Estate

Remarks: (2-1) Secured

Creditor: (952750609) Chase Bank USA, N.A.	**Claim No: 3** *Original Filed*	*Status:* *Filed by:* CR

History:
Details 3-1 09/25/2010 Claim #3 filed by Chase Bank USA, N.A., total amount claimed: $22281.77 (Visa Inc)

Description:

Remarks:

PO Box 15145 Wilmington, DE 19850-5145	*Date*: 09/25/2010 *Original Entered Date*: 09/25/2010	*Entered by:* Visa Inc, *Modified:*

Unsecured	claimed:	$22281.77
Secured	claimed:	$0.00
Priority	claimed:	$0.00
Unknown	claimed:	$0.00
Total	**claimed:**	**$22281.77**

History:

Details 3-1 09/25/2010 Claim #3 filed by Chase Bank USA, N.A., total amount claimed: $22281.77 (Visa Inc)

Description:

Remarks:

Creditor: (952750609) Chase Bank USA, N.A. PO Box 15145 Wilmington, DE 19850-5145	**Claim No: 4** *Original Filed Date*: 09/25/2010 *Original Entered Date*: 09/25/2010	*Status:* *Filed by:* CR *Entered by:* Visa Inc, *Modified:*

Unsecured	claimed:	$5047.70
Secured	claimed:	$0.00
Priority	claimed:	$0.00
Unknown	claimed:	$0.00
Total	**claimed:**	**$5047.70**

History:

Details 4-1 09/25/2010 Claim #4 filed by Chase Bank USA, N.A., total amount claimed: $5047.7 (Visa Inc)

Description:

Remarks:

Creditor: (952750609) Chase Bank USA, N.A. PO Box 15145 Wilmington, DE 19850-5145	**Claim No: 5** *Original Filed Date*: 09/25/2010 *Original Entered Date*: 09/25/2010	*Status:* *Filed by:* CR *Entered by:* Visa Inc, *Modified:*

Unsecured	claimed:	$5285.93
Secured	claimed:	$0.00
Priority	claimed:	$0.00
Unknown	claimed:	$0.00

History:

Details 5-1 09/25/2010 Claim #5 filed by Chase Bank USA, N.A., total amount claimed: $5285.93 (Visa Inc)

Description:

Remarks:

Total	**claimed: $5285.93**

History:
Details 5-1 09/25/2010 Claim #5 filed by Chase Bank USA, N.A., total amount claimed: $5285.93 (Visa Inc)

Description:

Remarks:

Creditor: (952771523) Internal Revenue Service P.O.Box 21126 Philadelphia, PA 19114	**Claim No: 6** *Original Filed Date*: 10/05/2010 *Original Entered Date*: 10/05/2010	*Status:* *Filed by:* CR *Entered by:* Internal Revenue Service, *Modified:*

Unsecured	claimed:	$0.00
Secured	claimed:	$0.00
Priority	claimed:	$5114.30
Total	**claimed:**	**$5114.30**

History:
Details 6-1 10/05/2010 Claim #6 filed by Internal Revenue Service, total amount claimed: $5114.3 (Internal Revenue Service)

Description:

Remarks:

Creditor: (952771523) Internal Revenue Service P.O.Box 21126 Philadelphia, PA 19114	**Claim No: 7** *Original Filed Date*: 10/06/2010 *Original Entered Date*: 10/06/2010	*Status:* *Filed by:* CR *Entered by:* Internal Revenue Service, *Modified:*

Unsecured	claimed:	$0.00
Secured	claimed:	$0.00
Priority	claimed:	$5114.30
Total	**claimed:**	**$5114.30**

History:
Details 7-1 10/06/2010 Claim #7 filed by Internal Revenue Service, total amount claimed: $5114.3 (Internal Revenue Service)

Description:

Remarks:

Creditor: (952780036)	**Claim No: 8**	*Status:*

History:
Secured claimed: $63440.14

History: Details 8-1 10/07/2010 Claim #8 filed by Wells Fargo Bank, N.A., total amount claimed: $63440.14 (Moburg, Mark)
Description:
Remarks:

Claims Register Summary

Case Name: Adam R Grossman
Case Number: 10-19817-SJS
Chapter: 11
Date Filed: 08/19/2010
Total Number Of Claims: 8

	Total Amount Claimed	Total Amount Allowed
Unsecured	$39031.60	
Secured	$150695.24	
Priority	$10228.60	
Unknown	$0.00	
Administrative		
Total	**$199955.44**	**$0.00**

PACER Service Center			
Transaction Receipt			
11/05/2010 21:11:10			
PACER Login:	mo0718	**Client Code:**	grossman
Description:	Claims Register	**Search Criteria:**	10-19817-SJS Filed or Entered From: 1/1/1980 Filed or Entered To: 11/5/2010
Billable Pages:	1	**Cost:**	0.08